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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1975

DONALD ABNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Solicitor General,

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Assistant Attorney General,

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A4) is unreported. An earlier opinion of the court of appeals is reported at 515 F.2d 112. The oral opinion of the district court (Pet. App. A2-A3) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4) was entered on February 10, 1976. A petition for rehearing was denied on March 5, 1976 (Pet. App. A5). The petition for a writ of certiorari was filed on Monday, April 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. a. Whether a pretrial order declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

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b. If so, whether the court of appeals has jurisdiction to consider a non-double-jeopardy claim presented pendent to that appeal.

2. Whether the Double Jeopardy Clause bars retrial after petitioners' convictions were reversed, at their behest, because the indictment was duplicitous.

3. Whether the pending indictment fails to state an offense.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on a one-count indictment charging them with attempting to obstruct commerce by extortion, in violation of 18 U.S.C. 1951, and with conspiring to do the same. The court of appeals reversed their convictions and remanded for a new trial (United States v. Starks, 515 F.2d 112). Reversal was required, the court held, because an improperly authenticated tape recording had been admitted in evidence (515 F.2d at 118-124). The court also indicated that the indictment was duplicitous. Without reaching the question whether the district court's instructions to the jury prevented any prejudice, the court held that on retrial the government would be required to elect between the conspiracy and attempt charges (id. at 118).

At a pretrial conference the prosecutor expressed his intention to proceed on the conspiracy charge. Petitioners then moved to dismiss the indictment, contending (1) that retrial would violate the Double Jeopardy Clause, and (2) that the indictment, as modified by the election to proceed on the conspiracy charge only, fails to charge an offense. The motions were denied by the district court, and petitioners

appealed. The government, observing that United States v. DiSilvio, 520 F.2d 248, 248, n. 2a (C.A. 3), had held that the pretrial denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable, asked the court of appeals to overrule DiSilvio and dismiss the appeal. It asked the court in any event to dismiss the appeal to the extent that it challenged the sufficiency of the indictment. The court of appeals ordered the case to be submitted on briefs without oral argument. It affirmed by judgment order, rejecting on the merits both of petitioners' arguments.

#### ARGUMENT

1. Here, as in Barket v. United States, No. 75-1280, the court of appeals permitted an immediate appeal from an interlocutory pretrial order rejecting a double jeopardy claim. What is more, the court of appeals in this case implicitly sanctioned immediate appeal from the pretrial denial of a claim that the indictment fails to charge an offense, at least where such a claim is presented together with a double jeopardy claim.

We have urged the Court to grant the petition in Barket.<sup>1/</sup> This case is slightly different from Barket, however. Here, as in Barket, the defendants joined other issues with their double jeopardy claim on appeal. In Barket the court of appeals, while asserting jurisdiction over the double jeopardy claim, declined to entertain the other claims presented; here the court of appeals entertained both the double jeopardy claim and the assault upon the sufficiency of the indictment. This case therefore presents the additional question whether, assuming that the court of appeals had jurisdiction over the

<sup>1/</sup> A copy of our memorandum in Barket has been furnished to petitioners' counsel.

double jeopardy claim, it was empowered to resolve the challenge to the sufficiency of the indictment.<sup>2/</sup> The Court accordingly may wish to consider granting the petition and setting it for argument in tandem with Barket.<sup>3/</sup>

2. Petitioners' double jeopardy claim rests on the premise that because the indictment is duplicitous their original conviction may have related to only one of the offenses. It is therefore theoretically possible, they contend, that the first jury believed them innocent of conspiracy, the charge upon which the prosecutor proposes to proceed. Thus, the argument concludes, to try petitioners again may be to try them on a charge of which they have been acquitted implicitly by the first jury.

The short answer to this is that their original convictions were reversed on appeal and remanded for a new trial at petitioners' behest. This precludes a double jeopardy challenge to retrial. United States v. Ball, 163 U.S. 662; Green v. United States, 355 U.S. 184, 189. Cf. Foreman v. United States, 361 U.S. 416, 425-426; Sapir v. United States, 348 U.S. 373.

What is more, the foundation of petitioners' argument -- that the jury implicitly may have convicted them of one offense and acquitted them of the other -- is not supported by the jury's verdict (an unqualified verdict of guilty) or by the opinion of the court of appeals when the case was first before

<sup>2/</sup> In our view, both of petitioners' claims are insubstantial. But under the approach of the court of appeals there is no impediment to joining a complex and close claim of any sort to an insubstantial double jeopardy argument. Joinder of this sort would enable defendants to obtain pretrial review of almost all claims, and the potential for delay in criminal cases would be considerable.

<sup>3/</sup> The Court also may wish to consider granting only this petition and holding Barket pending its decision in this case.

it. The court declined to decide whether the instructions to the jury were sufficient to prevent this sort of outcome. We submit that the instructions to the jury were sufficient. The court instructed the jury five times<sup>4/</sup> that all elements of both offenses must be proved beyond a reasonable doubt to support a conviction. Petitioners' claim that the court's instructions in this regard were contradicted by other instructions is not supported by a reading of the entire charge. There is simply no basis for concluding that petitioners were previously acquitted of the conspiracy charge.

3. Petitioners' contention that the indictment fails to state an offense because it does not allege that the defendants conspired "together" or formed a particular agreement (Pet. 7-9) is insubstantial. An indictment "is not to be construed in a technical manner but rather according to common sense." United States v. Pleasant, 469 F.2d 1121, 1125 (C.A. 8). See generally Hamling v. United States, 418 U.S. 87, 117-119. The indictment, with the attempt charge disregarded, charges that petitioners did "conspire \* \* \* to obstruct \* \* \* commerce \* \* \* by extortion \* \* \* by \* \* \* attempting to obtain \* \* \* money [from the victim] \* \* \*, the attempted obtaining of said [money] \* \* \* being \* \* \* intended to be accomplished with the consent of [the victim] induced and obtained by the wrongful use \* \* \* of actual and threatened force, violence and fear \* \* \*" (see Pet. App. C). A common sense construction necessarily leads to the conclusion that petitioners are charged with having conspired with each other, not each separately with a different unnamed person or persons.

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<sup>4/</sup> Four times in the original instructions (Tr. 10-25, 10-26, 10-33, 10-35) and once in the supplementary instructions (Tr. 10-60).

# CONCLUSION

We do not oppose the petition for a writ of certiorari in view of the importance of the threshold issue of the jurisdiction of the court of appeals.

Respectfully submitted.

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